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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 874

C. K. WALL,

Petitioner,

vs.

MRS. MATTIE BRIM

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT OPPOSING PETITION

JULIAN WEBB,
IRA CARLISLE,
A. B. CONGER,
Counsel for Respondent.

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Respondent

OPPOSING BRIEF BY RESPONDENT

The petition for review on writ of certiorari presents for consideration and determination two questions: First, Do the facts, statutes and decisions referred to present an issue of which this court should take cognizance? Second, Did the Circuit Court of Appeals commit error that should be considered and corrected by this court? If the answer to the first question is in the negative, the latter will be eliminated.

Petitioner seeks to invoke the jurisdiction of this court under Section 240 of the Judicial Code, as amended, which he contends is sustained by the case of *Sartor, et al.*, v. *Arkansas Natural Gas Corporation,* 321 U. S. 260; *Mercoid Corporation* v. *Mid-Continent Company,* 320 U. S. 661, and *Freeman* v. *Bee Machine Company,* 319 U. S. 448. Petitioner in his "Reasons for Grant of the Writ" submits that this case presents questions of importance and should be settled by this court; that is, the right of parties to amend

under Rule 15(b) and Rule 15(c) of the Federal Rules of Civil Procedure. Petitioner further contends that the decision of the Circuit Court of Appeals is in conflict with applicable decisions of the court of last resort of the State of Georgia, and cites the cases of *Perry* v. *Hodgson,* 168 Ga. 678, *Jeter* v. *Davis,* 33 Ga. App. 743, and *City of Columbus* v. *Anglin,* 120 Ga. 785.

A perusal of the Supreme Court cases and of the cases of the Supreme Court and Court of Appeals of the State of Georgia shows that they do not bear out petitioner's contention that the issue presented in this case comes within the jurisdiction of this court.

In the case of *City of Columbus* v. *Anglin,* 120 Ga. 785, Chief Justice Simmons in a very lengthy and elucidating opinion discusses the Georgia statute, requiring the courts to repel an amendment that sets up a new cause of action. He states that in former decisions of the Supreme Court of Georgia he finds "an irreconcilable conflict in the decisions" on the question, and finally not only criticizes but overrules all former opinions in conflict with that decision. He states, "So long as a plaintiff pleads but one wrong he does not set up but one cause of action. * * * Different facts may be alleged, separately and cumulatively, to show the same wrong, and the number and variety of the facts alleged will not make the case more than one cause of action so long as but one wrong is shown. A single wrong will not be made plural by alleging that it is made up of a number of constituent parts. He then states that a number of tests have been suggested for determining whether an amendment adds a new cause of action, that is, "whether the proposed amendment is a different matter, another subject of controversy, or the same matter more fully or differently laid to meet the possible scope and varying phases of the testimony." Another test he suggests is "whether the original petition and the amendment would be subject to the same

plea; whether the same evidence would support both; whether the same measure of damages is applicable to both; whether both could have been pleaded cumulatively in the same count; whether an adjudication upon one would bar a suit under the other." He further states, "If there is substantial identity of wrong (which necessarily includes identity of the right violated), there is substantial identity of cause of action. * * * So long as the facts added by the amendment, however different they may be from those alleged in the original petition, show substantially the same wrong in respect to the same transaction, the amendment is not objectionable as adding a new and distinct cause of action."

The Supreme Court of the State of Georgia in the case of *Perry* v. *Hodgson*, cited and relied upon by petitioner for jurisdictional grounds, in the first headnote says:

> "Where a surgeon enters into an agreement with a person merely to perform a certain operation, and the surgeon in violation of the contract goes further, without an emergency, and performs another operation, which is unauthorized by the agreement, or by an emergency necessitating the additional operation, and injury results to the patient, the surgeon cannot relieve himself from liability by showing skill and care in the other operation."

These cases from the court of last resort of the State of Georgia, instead of aiding the jurisdictional grounds, seem to negative that right.

The case was first tried on the theory that the petitioner did not bring to the exercise of his profession a reasonable degree of care and skill. The Circuit Court of Appeals reversed that trial because of the lack of professional or expert evidence to support the issue of negligence upon which the verdict and judgment were based. The Circuit Court of Appeals in its decision stated that the evidence

definitely presented another issue, and that is, whether the operation was performed without the patient's consent, and that that issue had not been submitted to the jury, and remanded the cause with direction that the parties be permitted to "amend their pleadings and to offer new and additional evidence as they are advised." The plaintiff, at the trial term, did offer an amendment setting forth that when the doctor discovered the seriousness of the operation he did not obtain the patient's consent before proceeding. The issue presented to and decided by the Circuit Court of Appeals was whether this amendment set up a new cause of action and was therefore barred by the Georgia statute of limitation. Georgia Civil Code (1933), Section 81-1301, provides:

> "All parties, whether plaintiffs or defendants, in the superior or other courts, whether at law or in equity, may at any stage of the cause, as matter of right, amend their pleadings in all respects, whether in matter of form or of substance."

Rule 15(b) provides:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be tried in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment."

Rule 15(c) provides:

> "Whenever the claim or defense asserted in the amended pleadings arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings the amendment relates back to the date of the original pleadings."

These rules, promulgated by the Supreme Court of the United States pursuant to authority conferred upon that

court by law (28 U. S. C. A., Section 723(b)), must mean something, and if they do, they provide for and take care of issues identical with the one presented. The claim asserted in the amendment "arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings." It was the same doctor, the same patient, the same occasion, the same operation and the same result. These rules, having been promulgated by the Supreme Court under authority of the law, have the same force and effect of a statute. If there is a variance or an apparent conflict between the Georgia statutes and the rules promulgated by the Supreme Court, the latter must prevail.

> "Where there is a Federal Statute on a subject of practice, that is paramount to State statutes."
> *Hill* v. *Walker*, 214 U. S. 517.

> "A substantive right or defense under Federal Employers' Liability Act, April 22, 1908, cannot be lessened by a local rule of practice."
> *Norfolk Southern R. Co.* v. *Ferrebee*, 238 U. S. 269.

In Simpkin's Federal Practice, Section 353, under the heading "Relating Back To Amendments," it is stated:

> "The new civil procedure rule on this subject makes it plain that the doctrine of relating back, so as to cut off the intervening statute of limitation, shall apply whenever the claim or defense asserted in the amended pleadings arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings. Even though the amended pleadings appear to set forth a new claim or defense arising out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings, the doctrine of relating back applies and an intervening statute of limitation cannot prevail. It is only where the claim or defense asserted in the amended pleadings does not arise out of the conduct, transaction,

> or occurrence set forth or attempted to be set forth in the original pleadings that an intervening statute of limitation will be held to be effective."

In the case of *New York Central* v. *Kinney*, 260 U. S. 340, Judge Holmes in delivering the opinion, in headnote 2, said:

> "An amendment of a complaint by a railroad employee seeking damages against the railroad for personal injuries, by alleging that the parties were engaged in interstate commerce at the time of the injury does not introduce a new cause of action, and therefore may be made, although the limitation period has elapsed since the injury occurred."

See, also, to the same effect *Missouri, Kansas & Topeka Ry. Co.* v. *Wulf*, 226 U. S. 570.

> "The rule in the Federal Courts as to 'relation back' is exceedingly liberal."
> *Hammond-Knowlton* v. *U. S.*, 121 Fed. (2d) 192.

In the case of *Blair* v. *Durham*, 134 Fed. (2d) 729, the court said:

> "An amendment to complaint does not set up a new cause of action so long as the cause of action alleged grows out of the same transaction and is basically the same or is identical in essential elements on which right to sue is based and upon which defendant's duty to perform is alleged to have arisen."

The fact that the doctor failed to obtain the consent of the patient after he discovered the operation to be much more serious and fraught with much more danger than he anticipated and so advise his patient appeared in each trial of the case, and was always a part of the case. It was upon this theory that the Circuit Court of Appeals called attention to the fact (*Wall* v. *Brim*, 138 Fed. (2d) 478) that the evidence definitely presented that issue which might have

been submitted to the jury, and in remanding the case gave direction that the plaintiff be permitted to "amend their pleadings and to offer new and additional evidence as they are advised."

Respondent respectfully submits, first, that under the facts and the law of the case the Supreme Court of the United States is without jurisdiction and should not take cognizance of the matter; and, secondly, that if this cause comes within the jurisdiction of this court, the Circuit Court of Appeals was correct in holding that the amendment did not set forth a new cause of action and was, therefore, not barred by the Georgia statute of limitation.

Respectfully submitted,

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